UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust Litigation	File No. 21MD1776 (JRT/JFD)
	Minneapolis, Minnesota June 28, 2023 10:12 A.M.

BEFORE THE HONORABLE JUDGE JOHN R. TUNHEIM

UNITED STATES DISTRICT COURT JUDGE

(JOINT MOTION TO DISMISS DIRECT-ACTION PLAINTIFFS' CLAIM)

APPEARANCES

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10:12 A.M.

(In open court.)

THE COURT: You may be seated. Good morning, everyone.

All right. Good to see you all today.

This is Multi District Litigation Number 21-2998, In re: Pork Antitrust Litigation.

We have the joint defense motion to dismiss the Direct Action Plaintiffs' consolidated complaint. So let's -- the Court has read the briefs. I think we've got, well, let's have whoever is intending to speak note their appearances for me this morning first.

Okay?

MR. ROBISON: Good morning, Your Honor. Brian Robison here representing Smithfield Foods.

I will be arguing part of the motion to dismiss for the defense group.

THE COURT: All right.

MR. TAYLOR: Jarod Taylor for the Tyson defendants.

I will be arguing for all defendants on the other parts of the motion to dismiss.

THE COURT: All right. Excellent.

MR. RANDALL: Good morning, Your Honor. Samuel

Randall on behalf of the Kroger DAPs, and I will be arguing on behalf of all DAPs today.

MR. KAPLAN: Robert Kaplan. I am liaison counsel for the DAPs.

But Mr. Randall is going to argue.

THE COURT: All right. Good morning to you, and good morning to everybody else.

All right. Let us proceed. Are you going to start first, Mr. Robison?

MR. ROBISON: I am, Your Honor. Your Honor, I will be addressing the statute of limitations and the fraudulent concealment issue.

Your Honor, the DAPs have alleged a widely publicized conspiracy. Like all the plaintiffs before them, they rely on four categories of public facts that they say state a conspiracy claim.

Number one, earnings calls. The DAPs rely heavily on calls with Wall Street analysts and others where they say the participants in the conspiracy described in detail how they were reducing supply, communicating with each other about reducing supply and also sharing confidential information.

Second category is Agri Stats. The DAPs quote extensively from Agri Stats public presentations and marketing materials where the DAPs say that Agri Stats was

freely telling everybody in the audience how their operations work, how their reports work and how their reports could be used to raise price.

Number three, the DAPs, like all the plaintiffs before them, rely heavily on newspaper articles and magazine articles. They relay what happened at trade association meetings and how the defendants were supposedly implementing the conspiracy by not running a second shift or not running a plant at full capacity.

Fourth category relates to pricing data. According to the DAPs' complaint, they say the conspiracy worked, and the abnormal pricing increases were reflected in public data circulated by multiple government agencies.

Now, we disagree with the idea there was a conspiracy. I think the Court understands that today we're not here to fight about that. We'll fight about whether there was a conspiracy when we get to summary judgment, but for today's purposes we have to take these public facts the DAPs have alleged as true and assume they state a conspiracy claim the way the DAPs claim.

Now, this is the same conspiracy the Court faced a few years ago when it first considered fraudulent concealment, and back then, the Court's common sense decision was that it's really tough to reconcile all these public facts I just ran through with the idea that this

conspiracy was somehow secret, was somehow concealed.

So after the Court rejected fraudulent concealment a few years ago, the class plaintiffs abided by that ruling. For years the class's cases have moved forward on the basis of a four-year damages period. That was true with class certification experts, class certification briefing, class certification hearing, Your Honor's class certification ruling.

And now just two weeks ago the classes served expert reports for the merits phase that also had a four-year damages period.

The DAPs are not satisfied with a four-year damages period. They are seeking to reach back in time to '08 or '09 with a nine- or ten-year damages period at least to make these enormous cases even larger.

THE COURT: Doesn't the complaint allege a lot more nonpublic, secret, concealed information than the earlier class complaint?

MR. ROBISON: Your Honor, I think what the new complaint alleges is more examples of exactly what the class complaint alleged, and I've got some slides I will work through, but just kind of at a high level, the class complaints all alleged secret meetings, surreptitious means of communication.

THE COURT: Without that much detail.

MR. ROBISON: True. They didn't have the dates of the e-mails. They didn't have the dates of the meetings, that sort of thing, but under the law, a communication between one conspirator and another conspirator is not concealment.

In any conspiracy, we would expect conspirators to be talking to each other. So under the law, like the *Milk* case, the *Wholesale Grocery* case, the other cases we have cited, communications between conspirators does not constitute fraudulent concealment. Conspirators you would think would always be talking to each other about their conspiracy.

Another category that the class plaintiffs alleged was pretextual statements. The DAPs are relying on the same pretextual statements. They filed some other examples, but under the law, pretextual statements are not fraudulent concealment.

That's the *Milk* case. That's the *Pocahontas* case that *Milk* relies on. *Wholesale Grocery* is another one. These cases say you would never expect somebody in a conspiracy to freely admit they were in a conspiracy, so we are not going to consider pretextual statements as proof of concealment.

So what they have added is, the who, what, where, when to some allegations, but those allegations are not

fraudulent concealment. So adding more detail to allegations that are not fraudulent concealment doesn't get them to concealment.

Now, I've got some slides I can hand out now that would, I think would kind of illustrate some of the things we are talking about. We exchanged these slides last night. Both sides have them.

THE COURT: All right.

MR. ROBISON: Your Honor, the first slide repeats one of the quotes from the Court's prior opinion. That really is crucial here because the DAPs have cases that talk about fraudulent concealment, but they don't have a case where the Court found fraudulent concealment with the kind of public facts we have here.

Monosodium Glutamate didn't have public facts like we have here. So I think the Court's comment in its first opinion is crucial to keep in mind here. The class plaintiffs had all the same facts, all these same public facts, that the DAPs are relying on to state a conspiracy claim.

So all these facts that are used to get past *Twombly* come back to haunt them when they then come back and try to say the conspiracy was concealed.

Slide 3 goes through in a little more detail, and it shows you exactly how the DAPs are relying on these

public statements. The earnings calls lay out in detail how the supply cuts were supposedly coordinated, how one defendant said I'm doing my part. Everybody else has to chip in.

These sorts of things are out in the open in the public. Trade association meetings, again, they're reported publicly in newspaper articles. Agri Stats, according to the DAPs, is showing samples of its reports, Power Point slides explaining how the reports are made, how audits are done.

Again, this is all public, and then the DAPs say their conspiracy worked, and there is an increase in price that is abnormal. And the proof of that they put in the complaint are charts from the USDA or the Bureau of Labor statistics showing this.

So then you've got the participants, the mechanism, the monitoring service, Agri Stats, and the price impact. This is all that they needed to state a conspiracy claim before discovery, which is why certain DAPs and the class plaintiffs did so.

Now, their answer to all of this is fraudulent concealment. We don't, don't need to spend a lot of time on slide 4. It just alleges the elements they have to allege. They have to allege facts for each, and failure to allege fact on any of them fails, means that they failed

fraudulent concealment.

And then the first element, the acts of concealment have to be separate from the conspiracy themselves, separate and apart or over and above. The language is different, but the concept in the *Ripllinger* case, the *Milk* case and the other cases is the same, that you can't rely on conspiracy acts or conspiracy communications to show fraudulent concealment.

So if we go to slide 5, we see again the Court goes through the fraudulent concealment allegations before, secret meetings, surreptitious means of communication, being careful in drafting e-mails, exchanges through Agri Stats, not confessing to a conspiracy and coming up with pretextual statements, and the DAPs allege the exact same kinds of concealment.

So if we go to the next slide, slide 6, this I think answers Your Honor's question. It's true for sure the DAPs now have more details on dates. No doubt about it. The problem for them is, they have more details on dates for communications that are still not fraudulent concealment.

So the first category, meetings and surreptitious means of communication, first these are not separate from the conspiracy. These are not actions that are solely designed to conceal the conspiracy, so they failed the

Ripllinger test.

But beyond that, we have five cases in our brief, the *Milk* case, *Premium Products*, *Litovich*, *RX.com* and *SD3* that say simply having conspirators talk to each other or have meetings is neither fraudulent nor concealment. That's just part and parcel of a conspiracy. So that's not concealment.

Having a meeting where the DAPs are not invited is not concealment.

THE COURT: So reading through the class complaint, it seemed, and I believe put in the order as well, that the heart of the complaint was all the public statements that led to the alleged conspiracy on prices.

This time it seems a little different. It seems like the heart of the complaint is much more focused on concealment issues.

Why am I incorrect about that?

MR. ROBISON: Your Honor, I think if we're talking about the conspiracy itself, it's the same conspiracy. It's a conspiracy to reduce the supply of pork in the U. S. somehow, either by reducing hogs or reducing plant capacity or increasing exports.

THE COURT: The issue, you know, that we're looking at is whether there is fraudulent concealment, and the class complaint really didn't get too deeply into the

who, what, when, where, why allegations. It just was a little bit more of a broad brush.

There is much more here, and it seems like it's more of a focus on the concealment, rather than on the sharing public statements that might lead to price fixing.

MR. ROBISON: Again, Your Honor, I think the DAPs for sure have added details. They have added dates. They have added names of people. They've got quotes from e-mails.

THE COURT: But not enough in your view?

MR. ROBISON: The quotes in the e-mails or the meetings are not concealment. It's not something specifically designed to throw the DAPs off and keep them from suing.

THE COURT: What about all the allegations about e-mails that keep this confidential or destroy this after reading, those kinds of references?

MR. ROBISON: Yep. Your Honor, that is new. That is new. That is new. Slide 8 covers that. That's the one piece of the complaint on concealment that I would concede is new.

It's not concealment, though. Again the cases we cite, *Premium Products* talks about this. In that case the plaintiffs sued, lost on fraudulent concealment, and one of its arguments on appeal was, wait a minute, I didn't know

they had all these internal e-mails that would have supported my case.

And the Court said, no, you're not entitled to internal e-mails. The DAPs were never going to see internal e-mails from these defendants. So as far as this idea of destroying evidence, first off, nothing was destroyed because the DAPs have the e-mails. That's how they can tell you about them.

So number one, there was no destruction of e-mails. Number two, even if somebody sends an e-mail and says please delete, that didn't conceal anything from the DAPs. These were internal e-mails within a company. The DAPs never knew about them. The DAPs were never going to see these e-mails.

So whether they're preserved, whether they are printed and put on a desk or whether they're deleted or attempting to delete them has no bearing on the DAPs and whether they can sue. They're not an internal e-mail monitoring system for Tyson or Smithfield or anybody else.

So they're never seeing internal e-mails. They would have no way of knowing whether they're preserved or deleted. So when somebody says please delete, that doesn't conceal anything from anybody outside the company.

You know, maybe the compliance department would have a problem if they're monitoring people's e-mails, but

the DAPs are not. They're never going to have access to these e-mails. They would have no idea whether they are preserved or deleted.

So if we flip back real quick to slide 6, I think we will see what we're talking about again. The second bullet point about using code names, the DAPs found one e-mail where one defendant supposedly referred to Walmart by W, and they say this is a code, and they're speaking in code.

Not much of a code, but again, it's an internal e-mail that the DAPs were never going to see. So using W as a code for Walmart inside a company doesn't fool the DAPs because they never saw it. So it didn't fraudulently induce them to not filing a lawsuit. They never saw it.

The next bullet point, exchanging information through Agri Stats, again this is just communications within the conspiracy. So this can't be fraudulent concealment under the *Milk* case and the other cases we cited.

And the last two are kind of similar, not confessing to a conspiracy and coming up with pretextual statements, we list I think seven cases that say you would never expect anybody to just confess to a conspiracy if they're in it.

So being silent or not disclosing is not

concealment. That's *Ripllinger* from the Eighth Circuit. That is *Milk*, *Wholesale Grocery* and a whole host of other cases. And then the pretextual statements, same thing.

Your Honor was right when it ruled earlier that these statements are not fraudulent concealment. That's what *Milk* says. That's what *Wholesale Grocery* says. *SD3* is another one.

So if you look at slide 7, we have more details about what you saw in the class complaints. This is all repeats. This is all old news, but the details, the who, what, when, where and why might match up with Rule 9(b), but substantively these are not concealment allegations.

So I've gone through the one new allegation about destruction of e-mails. The last thing I would mention, Your Honor, is on the last slide, and that's due diligence. That's the third element that needs to be alleged, and there are literally no facts in this lengthy complaint.

It is more than 400 paragraphs, no facts from any DAP as to how they exercised any diligence. We have all these earnings calls, all these newspaper articles, all these Agri Stats presentations, all these USDA pricing charts coming out.

And nobody asked a question. Not one DAP said I picked up the phone and called a defendant to ask what was going on. Not one DAP said here is what a defendant said

to me that threw me off and made me think I didn't have a case.

All they say is boilerplate, we exercised due diligence. Then they say we asked our supplier for bids. Calling somebody and saying what is your price for bacon or what is your price for ham is not due diligence.

So, again, when we look at the *Wholesale Grocery* case or *RX.com* case that we cite in our brief, just typing the words "due diligence" into a complaint doesn't satisfy the pleading standard. There is nothing in here about questions asked. Nothing in here about answers given that were false.

So I think on both the affirmative acts of concealment, they fail again. They have a whole bunch more detail of things that are not fraudulent concealment under the case law, and then again, we have got sophisticated buyers here with procurement departments, in-house lawyers, et cetera, who apparently didn't do any investigation, didn't ask any questions. There is no diligence at all.

THE COURT: All right. Thank you, Mr. Robison.

Mr. Taylor?

MR. TAYLOR: Good morning, Your Honor.

THE COURT: Good morning.

MR. TAYLOR: Defendants seek to dismiss DAPs' Packers and Stockyards Act claim in its entirety because

DAPs failed to allege any violation of a provision relating to the purchase, sale or handling of livestock.

And to illustrate that deficiency, I'm going to begin by highlighting the discrepancy between what DAPs alleged in Count II of their complaint, which is their PSA count, and what the PSA actually provides a private right of action for.

So turning to Count II, DAPs describe how defendants purportedly violated the PSA starting in paragraph 465, and they allege that the defendants violated the PSA in two ways there.

First, they allege that, quote unquote, "competitively sensitive information" is an article under the PSA and that defendants violated the PSA by exchanging articles for the purpose and with the effect of raising prices for pork, purportedly in violation of the prohibition on exchanging any article, for the purpose or with the effect of manipulating prices, which they describe in paragraph 462D.

And the second way DAPs allege that defendants violated the PSA is found in 467, and they say that defendants, quote, "Engaged in other conduct, including without limitation, communicating and otherwise coordinating with each other to restrict pork production."

So notice the focus of those allegation, sending

articles to manipulate the price of pork, communicating about production of pork. Not a word about any conduct relating to livestock there, and that's --

THE COURT: So really the question here boils down to whether we're talking about or whether livestock is the same as meat products or whether it's a different, different category, correct?

MR. TAYLOR: I agree that is an important question, and we addressed that in our brief.

Meat products are defined separately from livestock. Livestock is defined as the whole animal, and meat products are defined as edible. So really they're mutually exclusive.

THE COURT: The PSA has a direct action clause for just livestock, correct?

MR. TAYLOR: Yes, Your Honor. And so the reason we see all of these allegations about a meat product instead of livestock is because DAPs allege, they claim in paragraph 470 that the private right of action, "Provides that if any person subject to the PSA violates any provisions of the PSA then that person shall be liable to the person injured."

But DAPs got the private right of action all wrong. That's not what it says. As Your Honor noted, it's limited to livestock, and I believe in fact there was no

private right of action originally. It has accreted over time to add private rights of action for certain violations over time.

And since 1976, there has been this provision for violations of any provision relating to purchase, sale or handling of livestock. And it's not just relating to livestock. It's relating to the purchase, sale or handling of livestock.

And the DAPs conspicuously avoid giving any response to the legislative history that we provided as an attachment in our memorandum because that legislative history makes clear that this provision was designed to address direct transactions in livestock. It was to protect the farmers from the packers who had a lot more buying power than the farmers did.

So DAPs were forced to pivot in their opposition from this focus on articles or communications about pork to try to fit the square peg of a conspiracy to limit pork production into the round hole of a statute about livestock.

But what they never do is identify a provision of the PSA relating to the purchase, sale or handling of livestock that defendants purportedly violated.

THE COURT: You don't think too much of the dead livestock argument.

MR. TAYLOR: I don't, Your Honor. In my notes right here, I have a bullet on that, but I literally wrote "skip" next to it because to me, they're defined mutually exclusively.

I don't think you can say that there is a cause of action for pork because pork is a dead livestock. That would render this limitation a complete nullity, right? Anyone who had any dealing in meat would automatically have a private right of action, and that's not what was intended under the legislative history, and it's not what it states in the language itself.

But they do, DAPs do argue in their opposition now, and I'm sure they will argue in a few moments, that the conspiracy does include the reduction of swine, but notice how they try to ally the precise language of the private right of action to DAPs.

Anyone who does something wrong that vaguely impacts livestock in any way, whether directly or indirectly, in whole or in part, provides a private right of action, but again, that's not what the language says. The language is very precise.

Reducing a defendant's own sow herd isn't a purchase. It's not a sale. It's not the type of commercial transaction that handling seems to be referring to in this statute, especially when you look at it in

context and you look at that legislative history again.

So the case here is a bad fit. Again, this is a pork conspiracy that is affected by a number of mechanisms, including, for example, exports. That doesn't involve the purchase or sale or any type of touching livestock at all. That's your processed meat products.

And it's not going to be possible to disentangle damages from the overall pork conspiracy with damages from one sale here or one purchase here or one reduction here, even if they had alleged specific purchases or sales, which they do not.

So in conclusion, the retailers, downstream retailers' purchases of pork products are outside the zone of interest that were intended to be protected by the PSA's private right of action, which is why there has never been a case holding that someone in DAPs' position could assert such a claim.

So I'll pause for questions from the Court here before I move on to the portion of the motion on the product scope.

THE COURT: You can move on.

MR. TAYLOR: Okay. So defendants seek to dismiss two categories of products from DAPs' complaint. One, multi-ingredient products, like mixed-meat franks, sandwiches, burritos, pizzas, and I'll stop the list there.

And secondly, byproducts like blood and bone meal, and this motion is prompted by certain DAPs' motion to compel structured data filed in September relating to these products, yes, even burritos. DAPs in their opposition did not like our reference to burritos, but they sought structured data on it, and we assumed then that they were including that within their complaint, and that's why we're seeking to dismiss that as well.

In this courthouse here is a lot of sophisticated legal argument based on important policy considerations and complex economics, but some circumstances, I would submit, call for just common sense, and I would submit this is one of those circumstances.

This case has always been about pork meat. All the nonconclusory allegations in the complaint are about pork meat. Lots of comments about shoulders, ribs, et cetera. It has never been about bone meal or pet food.

And DAPs in their opposition rely heavily on their definition of pork to say, well, we say right here that pork does include bone meal, but that's not a nonconclusory factual allegation, and referring to it just begs the question. It doesn't answer the question.

There are no factual allegations anywhere in the complaint about products like bone meal and/or blood and the like or about the market for pork products once they go

downstream and get into a pizza or a multi-meat hot dog or something like that.

And to be clear, defendants do not seek to dismiss, on this motion, to dismiss products with a di minimus amount of other ingredients. So the glaze on a smoked ham or something like that is not what we're talking about. We're talking about products where the primary ingredient is not pork.

Defendants rely on two arguments to defend their lack of allegations about those types of products. First, they claim in their opposition, they don't allege it, but they claim that products like bone meal comes from hogs, and if you're reducing hogs, the price of everything from the hog is going to go up.

But that's actually not a given from an economic basis, and DAPs' allegations don't support it. So to take, reiterate one example we gave in our complaint, there is no reason to assume that bone meal from pigs are special and that, you know, these defendants can even try to control the supply of bone meal in the market.

Why can't they be substituted with bone from any other animals? There is nothing about that in the complaint, and DAPs fault defendants for purportedly requiring heightened pleading standards, but all we're asking for is some allegations, any allegations.

There are none in the complaint, and our point is not, for example, that we think DAPs have to prove that that there is limited substitution between bone meal from hogs and bone meal from other animals.

It's that the allegations that DAPs lodge in support of their conspiracy for pork products don't necessarily map on to other products like bone meal, et cetera.

THE COURT: Doesn't this start getting into factual distinctions among the products, perhaps a better argument for summary judgment?

MR. TAYLOR: So, Your Honor, I would agree with that to an extent. In the abstract, defendants or excuse me.

DAPs have a quote about not needing to define the product scope with a diamond cutter, and we agree with that, but that doesn't mean there are no obvious boundaries. There are no, again, to reiterate, there are no allegations about bone meal.

I think bone meal is as a matter of common sense that Your Honor is entitled to rely on is facially a much different product from something we all eat. All of the allegations, 400 paragraphs plus of allegations full of what -- how defendants view -- excuse me -- how DAPs view the market for pork meat.

Nothing about how they view the market for downstream multi-ingredient products or products like blood. So I think it is fair for Your Honor to use an axe here instead of a diamond cutter and make broad distinctions between obviously very different products.

And with that, I can conclude, Your Honor, subject to any questions you have.

THE COURT: That's fine. Thank you, Mr. Taylor.

All right. Mr. Randall.

MR. RANDALL: Thank you, Your Honor. If I can approach and pass up my slides.

THE COURT: You may.

MR. RANDALL: I think Your Honor is on point that there are substantial differences between the complaint that we pled at the end of 2022 and the one that the class plaintiffs pled without the benefit of discovery in January of 2020.

That our complaint is almost 100 pages longer than the class complaint. Admittedly, about half of the additional 100 pages relate to just naming all of the Direct Action Plaintiffs, but there are roughly 50 pages of substance there that are not included in the class complaint.

Now, the conspiracy we've alleged is much broader than the one that the class alleged was based on public

statements in 2021. Again, the class did not have the benefit of discovery, and so they were not able to go into the detail that we have done.

Now, we certainly include the public statements that the classes included. It would be malpractice I think not to include that, I think. The Court entered a 100-page order determining that certain allegations were necessary to make this conspiracy legally plausible.

We've included those same allegations that the Court relied on in finding the conspiracy plausible. We have also included substantially more than that. For example, we've alleged substantial detail about market allocation, that, again, it was not known to the class in 2020.

It's certainly part of the same conspiracy, but this was just -- we needed discovery to know about the market allocation aspect of defendants' agreement, the idea that the defendants were constrained by this concept of fair share or slaughter market share and that they followed this historical market allocation during the conspiracy. It was just not known to the plaintiffs in 2020, to the class plaintiffs in 2020.

Now, the allegations that the class included in 2020, they alleged on page one of the slide dec, they alleged secret meetings. They allege surreptitious

communications, limiting explicit reference to pricing, and the Agri Stats allegations.

The Court evaluated those allegations and recognized that these are the whole allegations. We're cutting and pasting these allegations from the class complaint, that there was not detail to these allegations, that these allegations, as I read the Court's order, could constitute fraudulent concealment, but in order for them to do so, Rule 9 requires the who, what, when, where and how.

So in contrast to the class plaintiffs, we have included all of that, the who, what, when, where and how of fraudulent concealment.

Now, just to be clear, the defendants chose to bring this as a 12(b)(6) argument, so there is no dispute that the traditional 12(b)(6) notice pleading generally applies here subject to the heightened standard under Rule 9(b) limited to the allegations of fraud.

Defendants are not able to go beyond the complaint. The defendants, again, they chose to bring this as a motion to dismiss, and so they have to live by that chance -- that choice.

As I read Mr. Robison's or as I heard him say, there is the admission that we have included the who, what, when, where and how for numerous allegations in our complaint. We have a specific section of our complaint

devoted to fraudulent concealment.

There are -- it's 15 pages long, 43 numbered paragraphs in this section. Again, none of this information was available to the class in 2020, and so the allegations we've included do far more than support the existence of the conspiracy.

Now the defendants rely -- argument is relying on two points, I think. First, they need the separate and apart standard to apply, but they're not even really arguing for the separate and apart standard. There are three potential standards for fraudulent concealment.

There is the self-concealing standard. Your Honor in 2020 rejected the application of that standard, but then there is the affirmative acts standard which most courts apply, and then there is the separate and apart standard, which says that you have to include acts that are separate and apart from the conspiracy.

But the defendants ignore the two cases from this circuit, from this district, where the courts have found that the separate and apart standard is satisfied in *Wirebound Boxes* first and then in *Monosodium Glutamate*. In both of those cases, the Court applied the separate and apart standard and found that it was satisfied.

Our allegations compare very favorably to the allegations in both of those cases. It's demonstrably

wrong, the argument that the defendants are making, that communications in furtherance of the conspiracy can't also be used to satisfy the separate and apart standard.

Essentially all of the conduct that both *Wirebound Boxes* and *Monosodium Glutamate,* both of those courts relied on, were communications between the defendants, but there was some aspect of the communications that -- where -- or some conduct where the defendants took steps beyond just communicating to, to impart a degree of confidentiality or concealment.

So that's, again, that's what we're dealing with here. Even under the separate and apart standard, again we disagree that it should apply, but we meet it even if it does.

Importantly, *Monosodium Glutamate* is a summary judgment case. So again, I mean we're at the 12(b)(6) stage, but even under the heightened standard of summary judgment, our allegations compare very favorably to the allegations in that case.

The slide dec at page 5 there, we have included specific examples. Again, none of these allegations, and these are just representative examples of what we include, were available to the class in 2020. You know, the e-mail from a Seaboard executive on November 23rd, 2010, again providing the date, providing the person's specific name

and exactly what he said.

Now, importantly, this is demonstrative of how the separate and apart standard could apply. So this is a conspiracy communication, but the statement "want to keep this confidential" is separate and apart from the conspiracy communication itself.

It's not strictly necessary to the communication itself, and so under the separate and apart standard, as applied by courts in this district, this is the type of allegation that does satisfy even that heightened standard.

You know, we've alleged similar examples. Again with -- in every single one of these instances, the who, what, when, where and how as to Tyson, as to Smithfield, as to Clemens.

Skipping ahead to page 7 of the slide dec, we have also alleged instructions to destroy. Now, I appreciate the creativity of the defendants' argument on this point. This is an argument for a jury, not a motion to dismiss.

The idea that an instruction to someone to destroy evidence of a conspiracy can't be used to prove fraudulent concealment would turn that standard on its head. No court has ever held that. The cases the defendants cite do not stand for that proposition.

This is, and this is the type of evidence or the

type of allegation that goes far beyond what was available to the plaintiffs in either *Wirebound Boxes* or *Monosodium Glutamate*. The example on, I think it's page 8 of the slide dec, the October 19th, 2011, exchange between Tyson executives. This is, again, another example of how this meets the separate and apart standard.

The Tyson executive, you know, again I don't need to say his name, but we have identified him by name in the complaint. We've identified the date of communication, how it was communicated by e-mail, and specifically what he said.

And so in addition to the conspiracy communication, which essentially acknowledges the existence of this fair share agreement, acknowledging that Tyson felt constrained in its production decisions to go above its fair share.

In addition to that statement, he also says, "I trust you will read and delete and not repeat this." That's separate and apart from the conspiracy communication.

Now, the idea that we have all of the evidence of defendants' conspiracy, we strenuously dispute that, and again, these are questions of fact that can be argued to the jury. The fact that the defendants included instructions to each other to delete evidence certainly

lends itself to the conclusion that evidence was in fact deleted.

We have found almost 15 years after the fact examples that were not successfully deleted, but this certainly supports the reasonable inference that evidence of their conspiracy was in fact deleted. I think we're fully entitled to argue that to a jury.

The defendants, Mr. Robison, can make the same argument that he made here today, but that's to a jury. It's not, it's not a legal argument at the 12(b)(6) stage. Again, we've included specific allegations of pretextual statements.

Now again, it's not the law that pretextual statements cannot support fraudulent concealment. As I read the Court's order and the *Milk Products* case, there is something -- which we understand, that to the extent there is a conspiracy, failing to own up to that conspiracy can't be used to support fraudulent concealment. We understand that.

The allegations we've made show a recognition by the defendants that their public statements or their statements to customers were misleading. Just as they have done in this litigation, the defendants have pointed to the H1N1 virus or the PED virus as a reason why supply was decreasing.

Their internal statements reflected the recognition that this wasn't really accurate, that these things were out there, but the effect was minimal, and it really was not having a material effect on supply.

And finally, the fourth category of evidence, the secret meeting, again, the class plaintiffs made the allegation of secret meetings. We've alleged the existence of secret meetings supported by all the detail required by 9(b). That's the difference between what we have done and what the class did in 2020.

So we have alleged the dates of these meetings, and we have alleged specifically how these meetings were used to conceal the conspiracy. So, for example, The Pork Club had this no attribution rule where the people who attended the meetings were not allowed to attribute statements made at these meetings to the attendees.

Again, it provides an ideal environment for the defendants to get together in what we fully acknowledge is a legitimate group, a legitimate trade association, but to have a forum with the air of legitimacy to conduct the conspiracy and keep it secret.

Now, the defendants are also arguing due diligence here. Again, the Court resolved this in its 2020 order. In the November 2020 order, the Court evaluated what the class alleged and said that the class's

boilerplate allegation on diligence was sufficient to satisfy that element.

We have relied on that holding in crafting the consolidated complaint. Again, I don't need to belabor the point. As the Court, as the Court is aware, we were required to file a consolidated complaint that included -- you know, to get a consensus for all the DAPs that, you know, in a single document.

To include plaintiff-specific allegations of due diligence in that complaint, given the Court's prior order on that, I think is directly inconsistent with the purpose of requiring the consolidated complaint.

THE COURT: There are two dates that are used for knowledge of the claims. I think the complaint says that you couldn't have knowledge of the complaints prior to June 24th, and then there is another date, June 28th.

MR. RANDALL: Yeah. It's a mistake, Your Honor. The operative date should be June 28th.

THE COURT: The 28th?

MR. RANDALL: That's four years back from when the class filed a complaint. That's just a typo. The operative date should be June 28th, 2014. Thank you.

So, again, the defendants haven't included any argument here why the Court was wrong about the issue of diligence in 2020, but it's also not true that we have

included literally no detail. I mean, I don't pretend that we have included detail of allegations that are DAP specific.

But as the defendants' own slide dec acknowledges, we have given representative examples of the types of due diligence that DAPs employed during the conspiracy, which we viewed as really just kind of extra credit because it wasn't required by the Court at all under the Court's prior holding.

Quickly, under the PSA, even if the defendants are right about the meat products issue, which we disagree with, we have also alleged violations related to the purchase of livestock and handling of livestock. So there is no requirement that someone alleged violations of all three of the clauses of PSA.

Anyone who is injured by the purchase, sale or handling of livestock can bring a cause of action. The defendants have made no argument that we haven't alleged violations related to purchase or handling.

I mean, much of the complaint details the sow liquidation. That plainly relates to the handling of livestock. If the defendants were liquidating their sows, killing their sows, for the purpose of reducing supply, that is something that satisfies the PSA.

The same thing. We have alleged the defendants

used their relationships with contractual hog farmers to reduce supply, to pressure -- for those defendants that purchased sows to pressure their suppliers to reduce supply. Again, that plainly meets the purchase standard.

So I don't think the Court even needs to reach the issue that the defendants are raising, which we disagree with, because it would undermine the purpose of this private right of action.

If someone could not bring a claim related to the purchase of meat products in an industry where most defendants are fully vertically integrated, it would cut off the application of the PSA entirely, which, you know, the case law interpreting it says that the PSA should be liberally construed.

And so it would undermine the purpose of the PSA to put in the reading that the defendants are asking for here.

THE COURT: I guess the question there is whether that's too indirect an impact.

MR. RANDALL: Well --

THE COURT: The killing, the liquidating of sows, for example.

MR. RANDALL: Frankly, I don't see what type of handling, what handling could mean other than, you know -- if handling means anything, it certainly relates to how the

defendants managed the sows under their control when they had them.

THE COURT: Okay.

MR. RANDALL: Lastly, we think the defendants are just wrong about the multi-products issue. This is a conspiracy to reduce the supply of pork available for sale in the United States.

The complaint, as the defendants acknowledged today, our complaint defines pork to include these products. There is no issue that we've pled this in our complaint, and there is really no argument.

We agree that common sense should apply here, and common sense says, if you reduce the supply of pork, then all pork sold is going to be affected, affected by that. So, again, the defendants make a big deal out of burritos, so let's use that which we think is an extreme example.

This is, it's really a damages argument that they're wrapping up in a 12(b)(6) argument. The defendants are fully entitled to raise this as a *Daubert* challenge as a motion in limine and say that the plaintiffs, the DAPs, haven't traced the conduct alleged in the conspiracy to specific products.

To use an axe, as Mr. Taylor asked you to do, would be legally inappropriate and lead to, we think, bizarre results.

So applying this to burritos, Tyson should not be able to escape liability for its conduct by wrapping pork it sold in a burrito or wrapping it in a tortilla. There is no principled way of applying the ruling that the courts want this Court to enact. It would lead to chaos and confusion.

There is no reason why a burrito with 49 percent pork should be treated differently than a burrito with 75 percent pork. It would have consequences, we think, for all future antitrust cases.

In the Beef case, if a beef burrito under Mr. Taylor's definition, a beef burrito that has mostly beef would be fine. A beef and cheese burrito, depends on the, you know, depends on, you know, how it's prepared.

Then, you know, if you include eggs in that, then you're getting below the 50 percent standard and it's out. There is no principled way to apply this at the 12(b)(6) stage of the case. This is a damages argument. The defendants are fully entitled to bring this as a *Daubert* challenge, and we think that's the appropriate time to bring this.

THE COURT: All right. Thank you, Mr. Randall.

Mr. Robison, did you have any brief rely?

MR. ROBISON: Yes, Your Honor. Thank you.

I want to be incredibly clear that the conspiracy

here has not changed. The same defendants are accused today of reducing the supply of pork in the U. S. somehow, either through exports or reducing hogs or reducing plant capacity.

The DAPs may have found additional documents they like that they think support that conspiracy claim, but the fundamental conspiracy claim has not changed. It's the same conspiracy, and as I noted before, slide 3 shows you how the participants were publicly identified. The mechanisms for reducing supply were publicly disclosed.

The monitoring system, Agri Stats, publicly advertised its marketing materials, and the price effect of this conspiracy was reported by the government. All of that is public.

That's all sufficient to file a case, which is why certain DAPs like Winn-Dixie did file cases years ago, and that's why the class actions were filed years ago. They didn't have to wait to get all this discovery and all these additional e-mails and all these additional examples that don't matter under the law in order to file a case.

And that's where I think we ought to take a step back and think about the fraudulent concealment doctrine at a higher level. The point of this doctrine is, a plaintiff that has been directly duped, there was something that was directed toward a plaintiff to convince a plaintiff it

didn't have a case, that can be fraudulent concealment.

Here, we don't have that. Here, we have a public conspiracy that is already out in the open. It's already been disclosed, and the DAPs have never identified anything directed at them that fooled them into thinking they didn't have a case.

If you look at the pretextual statements in the complaint, the DAPs don't even allege they saw them. Not once did the DAPs allege somebody from Kroger or somebody from Winn-Dixie or somebody from Sysco saw these pretextual statements and was duped into thinking he didn't have a lawsuit.

The internal e-mail exchanges where somebody says keep this confidential or delete it, never directed at a DAP. They never saw it. That didn't fool them into thinking they didn't have a case. So I agree they have added additional details.

They have added details that do not matter. They flat out do not matter under the law. The DAPs have no answer for the *Milk* case that says pretextual statements are not fraudulent concealment. They have no answer for *Wholesale Grocery* or *Litovich* or *New Prime*, the cases we cite that have the publicly disclosed conspiracy.

Where the courts reject fraudulent concealment, those courts say when you have got a public conspiracy, you

literally cannot have fraudulent concealment. You cannot say you were fooled into thinking you did not have a case when your case is in the public eye. The DAPs have no answer for those cases.

They bring up *Monosodium Glutamate* and *Wirebound Boxes*. I encourage the Court to read those. They are entirely different here. There are no public facts alleged in either case.

Neither one of those cases has what we have here, earnings calls, Agri Stats public marketing, government reports showing price effects, all these things that the classes and Winn-Dixie used to get past *Twombly*, all these public facts completely absent from *Wirebound* and *MSG*. Simply not there.

Those cases also have fake bids and bid-rigging and other things that are not here, but the fundamental problem with those cases is, they don't have everything I put on slide 3. They don't have all the public facts.

Again, on the destroying evidence, nothing directed at the DAPs. They never saw these e-mails. They never would have seen these e-mails. There is nothing in the complaint alleged that somebody at Kroger decided in 2010 he didn't have a lawsuit because he thought Tyson was deleting e-mails.

I mean, this is completely far afield from

fraudulent concealment. There is nothing here saying that these DAPs were fooled into not suing earlier because of what was going on internally at Tyson. The DAPs never saw these e-mails. Never would have seen them.

They weren't doing audits, so whether they were preserved, printed or deleted would have no effect on whether the DAPs sued. The pretextual statements, pages 1022 to 1023 of the *Milk* case address this. *Wholesale Grocery* rejects it. *SD3* is another case that rejects it.

These pretextual statements, they can add all the detail they want, all the names and dates, and they still don't amount to fraudulent concealment.

Meetings, they talk about The Pork Club. Pork Club had a no attribution rule. This was also publicly disclosed. Paragraph 204 of the complaint talks about these rules at The Pork Club. It cites a 2011 Agri marketing article that publicly disclosed the rules of The Pork Club.

The rules didn't say you can't repeat what was said at a meeting. It said you can't attach a name to it, no attribution. So there is no confidentiality over what was said there. You just don't link it back to a particular person.

That's all that they have alleged. That's all that is in the newspaper article that again is public.

Again, even these Pork Club rules are not secret. Even The Pork Club rules were out in the public. Even The Pork Club rules are in the public domain in news articles they quote in the complaint.

So, again, that fails to show that the DAPs were fooled into thinking they didn't have a case because of some rule at a Pork Club meeting attended by 60 people.

Finally on due diligence, we apologize if we misread Your Honor's prior order. It looked like to us the due diligence ruling in the prior order was focused on consumers. The Court repeatedly used consumers, reasonable consumers, et cetera.

In our mind that may have been directed more at the IPP plaintiffs, the consumer plaintiffs. That's not what we have here. These are massive companies with thousands of employees. They have got entire procurement departments that negotiate price.

And after paragraph upon paragraph of public facts, all of the talk about USDA charts showing price increases, all the talk about earnings calls, all the talk about what Agri Stats is doing, there is not a single fact saying anything about a DAP picking up the phone and asking about these price increases.

Nothing about a pretextual statement made to a DAP. This consolidated complaint has individual

allegations about certain other DAPs. Certain other facts are alleged about each plaintiff. They could have easily added that here, and they didn't.

At no point in the prior complaints when the DAPs were filing individual complaints, they also didn't put any due diligence in there. They didn't allege anything. So we think, again, under *Wholesale Grocery* and the other cases we cite, just typing boilerplate words "we did due diligence" is not enough. We think that fails.

We have got a case here that is unlike the ones they are citing. We have a case here that has widespread public distribution of facts. The class cases have been abiding by your order with a four-year damages period.

We think the Court got it right the first time, and we would urge the Court to make the same ruling today.

THE COURT: All right. Thank you, Mr. Robison.

Did you have anything else, Mr. Taylor?

MR. TAYLOR: If I may, Your Honor.

THE COURT: Go ahead.

MR. TAYLOR: A few discrete points in rebuttal. With respect to whether sow liquidation is handling, the word "handling" should be looked at in context with the other types of activities that are listed there, sales, purchases.

This is a transaction. It's like when a grower

hands over their livestock to a stockyard, the stockyard is responsible for the animals. It's a third party that has obligations to the grower, sells the livestock or a transporter, something like that.

This is not an animal welfare statute or something else that is about how an entity treats its own livestock. If I go to a farm and I trip over their lamb or whatever it is, I can't bring a claim under the PSA because they didn't handle their own livestock well.

To the extent, to the extent there is any ambiguity and to your point about whether what DAPs are claiming is really too indirect of an injury, again I would direct the Court to the legislative history, which is very clear about the wrongs, the injuries, that this private right of action was seeking to remedy, and it's quite limited. It's not about downstream retailers.

With respect to DAPs' point about whether defendants' theory would cut off their -- anyone's rights under the PSA, of course it wouldn't cut off those who are purchasing livestock, selling livestock or paying someone to handle their livestock.

For other violations, it's not that there is no remedy. It's that it is a different remedy. The Secretary of Agriculture handles that.

The real risk here is not cutting off liability.

It's unleashing a whole new type of case under this statute that was never intended to be brought under it without any limiting principle.

So then turning to the product scope, to the point about whether this is really a damages question that should be argued at summary judgment or at *Daubert*, the reason it is a pleading issue now is because defendants are not saying it's impossible to bring a claim on downstream products.

If Tyson is integrated and didn't sell pork products and only sold burritos that it incorporated the pork products into, it's not that you couldn't bring a case against Tyson.

But you would have to make some allegations about those products, about why the defendants had market power for those products, et cetera, and there is none of that in the complaint.

Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Taylor.

Thank you, Counsel, for your arguments today. Excellent. I appreciate it.

The Court will take the motion under advisement and will issue an order as quickly as possible.

MR. ROBISON: Thank you, Your Honor.

THE COURT: We will be in recess.

COURTROOM DEPUTY: All rise.

(Court was adjourned.)

* * *

I, Kristine Mousseau, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Kristine Mousseau, CRR-RPR*
Kristine Mousseau, CRR-RPR